

E-Filed: January 28, 2014

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HEWLETT-PACKARD COMPANY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DISCOVER GROUP, INC., a New York
Corporation,

Plaintiff,

v.

HEWLETT-PACKARD COMPANY, a
Delaware Corporation,

Defendant.

Case No. 12-cv-4077 (EJD)

**AMENDED ~~PROPOSED~~ STIPULATED
PROTECTIVE ORDER
(MODIFIED BY THE COURT)**

1. PURPOSES AND LIMITATIONS

Disclosure and discovery activity in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation may be warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated

Protective Order. The parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles. The parties further acknowledge, as set forth in Section 12.3, below, that this Stipulated Protective Order does not entitle them to file confidential information under seal; Civil Local Rule 79-5 and General Order 62 set forth the procedures that must be followed and the standards that will be applied when a party seeks permission from the court to file material under seal.

2. DEFINITIONS

2.1 Challenging Party: a Party or Non-Party that challenges the designation of information or items under this Order.

2.2 "CONFIDENTIAL" Information or Items: information (regardless of how it is generated, stored or maintained) or tangible things that qualify for protection under Federal Rule of Civil Procedure 26(c).

2.3 "Highly Confidential – Attorneys' Eyes Only" Information or Items: extremely sensitive "Confidential Information or Items" whose disclosure to another Party or Non-Party would create a substantial risk of serious injury that could not be avoided by less restrictive means.

2.4 Counsel (without qualifier): Outside Counsel of Record and House Counsel (as well as their support staff).

2.5 Designating Party: a Party or Non-Party that designates information or items that it produces in disclosures or in responses to discovery as "CONFIDENTIAL;" or "Highly Confidential -- Attorneys' Eyes Only."

2.6 Disclosure or Discovery Material: all items or information, regardless of the medium or manner in which it is generated, stored, or maintained (including, among other things, testimony, transcripts, and tangible things), that are produced or generated in disclosures or responses to discovery in this matter.

2.7 Expert: a person with specialized knowledge or experience in a matter pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert witness or as a consultant in this action.

2.8 House Counsel: attorneys who are employees of a party to this action. House Counsel does not include Outside Counsel of Record or any other outside counsel.

2.9 Non-Party: any natural person, partnership, corporation, association, or other legal entity not named as a Party to this action.

2.10 Outside Counsel of Record: attorneys who are not employees of a party to this action but are retained to represent or advise a party to this action and have appeared in this action on behalf of that party or are affiliated with a law firm which has appeared on behalf of that party.

2.11 Party: any party to this action, including all of its officers, directors, employees, consultants, retained experts, and Outside Counsel of Record (and their support staffs).

2.12 Producing Party: a Party or Non-Party that produces Disclosure or Discovery Material in this action.

2.13 Professional Vendors: persons or entities that provide litigation support services (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and organizing, storing, or retrieving data in any form or medium) and their employees and subcontractors.

2.14 Protected Material: any Disclosure or Discovery Material that is designated as “Confidential” or as “Highly Confidential – Attorneys’ Eyes Only.”

2.15 Receiving Party: a Party that receives Disclosure or Discovery Material from a Producing Party.

3. SCOPE

The protections conferred by this Stipulation and Order cover not only Protected Material (as defined above), but also (1) any information copied or extracted from Protected Material; (2) all copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony, conversations, or presentations by Parties or their Counsel that might reveal Protected Material. However, the protections conferred by this Stipulation and Order do not cover the following

information: (a) any information that is in the public domain at the time of disclosure to a Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as a result of publication not involving a violation of this Order, including becoming part of the public record through trial or otherwise; and (b) any information known to the Receiving Party prior to the disclosure or obtained by the Receiving Party after the disclosure from a source who obtained the information lawfully and under no obligation of confidentiality to the Designating Party. Any use of Protected Material at trial shall be governed by a separate agreement or order.

4. DURATION

Even after final disposition of this litigation, the confidentiality obligations imposed by this Order shall remain in effect until a Designating Party agrees otherwise in writing or a court order otherwise directs. Final disposition shall be deemed to be the later of (1) dismissal of all claims and defenses in this action, with or without prejudice; and (2) final judgment herein after the completion and exhaustion of all appeals, rehearings, remands, trials, or reviews of this action, including the time limits for filing any motions or applications for extension of time pursuant to applicable law. **For a period of six months after final disposition of this litigation, this Court will retain jurisdiction to enforce the terms of this Order.**

5. DESIGNATING PROTECTED MATERIAL

5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party or Non-Party that designates information or items for protection under this Order must take care to limit any such designation to specific material that qualifies under the appropriate standards. The Designating Party must designate for protection only those parts of material, documents, items, or oral or written communications that qualify – so that other portions of the material, documents, items, or communications for which protection is not warranted are not swept unjustifiably within the ambit of this Order.

Mass, indiscriminate, or routinized designations are prohibited. Designations that are shown to be clearly unjustified or that have been made for an improper purpose (e.g., to unnecessarily encumber or retard the case development process or to impose unnecessary expenses and burdens on other parties) expose the Designating Party to sanctions. If it comes to a Designating Party's attention that information or items that it designated for protection do not

1 qualify for protection, that Designating Party must promptly notify all other Parties that it is
2 withdrawing the mistaken designation.

3 5.2 Manner and Timing of Designations. Except as otherwise provided in this Order
4 (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered,
5 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so
6 designated before the material is disclosed or produced.

7 Designation in conformity with this Order requires:

8 (a) for information in documentary form (e.g., paper or electronic documents,
9 but excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing
10 Party affix the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’
11 EYES ONLY” to each page that contains protected material. If only a portion or portions of the
12 material on a page qualifies for protection, the Producing Party also must clearly identify the
13 protected portion(s) (e.g., by making appropriate markings in the margins). A Party or Non-Party
14 that makes original documents or materials available for inspection need not designate them for
15 protection until after the inspecting Party has indicated which material it would like copied and
16 produced. During the inspection and before the designation, all of the material made available for
17 inspection shall be deemed “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” After
18 the inspecting Party has identified the documents it wants copied and produced, the Producing
19 Party must determine which documents, or portions thereof, qualify for protection under this
20 Order. Then, before producing the specified documents, the Producing Party must affix the
21 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” legend to
22 each page that contains Protected Material. If only a portion or portions of the material on a page
23 qualifies for protection, the Producing Party also must clearly identify the protected portion(s)
24 (e.g., by making appropriate markings in the margins).

25 (b) for testimony given in deposition or in other pretrial or trial proceedings,
26 that the Designating Party identify on the record, before the close of the deposition, hearing, or
27 other proceeding, all protected testimony, and further specify any portions of the testimony that
28 qualify as “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”. When it is impractical

1 to identify separately each portion of testimony that is entitled to protection, and when it appears
 2 that substantial portions of the testimony may qualify for protection, the Party or Non-Party that
 3 sponsors, offers, or gives the testimony may invoke on the record (before the deposition or
 4 proceeding is concluded) a right to have up to 21 days to identify the specific portions of the
 5 testimony as to which protection is sought and to specify the level of protection being asserted
 6 (“CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”). Only
 7 those portions of the testimony that are appropriately designated for protection within the 21 days
 8 shall be covered by the provisions of this Stipulated Protective Order.

9 (c) for information produced in some form other than documentary and for any
 10 other tangible items, that the Producing Party affix in a prominent place on the exterior of the
 11 container or containers in which the information or item is stored the legend “CONFIDENTIAL”
 12 or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” If only a portion or portions
 13 of the information or item warrant protection, the Producing Party, to the extent practicable, shall
 14 identify the protected portion(s), specifying whether they qualify as “Confidential” or as “Highly
 15 Confidential – Attorneys’ Eyes Only.”

16 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
 17 designate qualified information or items does not, standing alone, waive the Designating Party’s
 18 right to secure protection under this Order for such material. Upon timely correction of a
 19 designation, the Receiving Party must make reasonable efforts to assure that the material is
 20 treated in accordance with the provisions of this Order.

21 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

22 6.1 Timing of Challenges. Any Party or Non-Party may challenge a designation of
 23 confidentiality at any time. Unless a prompt challenge to a Designating Party’s confidentiality
 24 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic
 25 burdens, or a significant disruption or delay of the litigation, a Party does not waive its right to
 26 challenge a confidentiality designation by electing not to mount a challenge promptly after the
 27 original designation is disclosed.
 28

6.3 Judicial Intervention. If the Parties cannot resolve a challenge without court parties shall comply with the undersigned's Standing Order re: Civil Discovery Disputes. intervention, the Designating Party shall file and serve a motion to retain confidentiality under Civil Local Rule 7 (and in compliance with Civil Local Rule 79.5 and General Order 62, if applicable) within 21 days of the initial notice of challenge or within 14 days of the parties agreeing that the meet and confer process will not resolve their dispute, whichever is earlier. Each such motion must be accompanied by a competent declaration affirming that the movant has affirmed that have been satisfied complied with the meet and confer requirements imposed in the preceding paragraph. Failure by the Designating Party to timely seek judicial intervention make such a motion including the required declaration within 21 days (or 14 days, if applicable) shall automatically waive the confidentiality designation for each challenged designation. In addition, the Challenging Party may seek relief with respect to file a motion challenging a confidentiality designation at any time if there is good cause for doing so, including a challenge to the designation of a deposition transcript or any portions thereof. Any motion brought pursuant to this provision must be accompanied by a competent declaration affirming that the movant has complied with the meet and confer requirements imposed by the preceding paragraph.

1 The burden of persuasion in any such challenge proceeding shall be on the Designating
 2 Party. Frivolous challenges, and those made for an improper purpose (e.g., to harass or impose
 3 unnecessary expenses and burdens on other parties) may expose the Challenging Party to
 4 sanctions. Unless the Designating Party has waived the confidentiality designation by failing to
 5 ~~file a motion~~ **seek relief** to retain confidentiality as described above, all parties shall continue to afford the
 6 material in question the level of protection to which it is entitled under the Producing Party's
 7 designation until the court rules on the challenge.

8 7. ACCESS TO AND USE OF PROTECTED MATERIAL

9 7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or
 10 produced by another Party or by a Non-Party in connection with this case only for prosecuting,
 11 defending, or attempting to settle this litigation. Such Protected Material may be disclosed only to
 12 the categories of persons and under the conditions described in this Order. When the litigation has
 13 been terminated, a Receiving Party must comply with the provisions of section 13 below (FINAL
 14 DISPOSITION).

15 Protected Material must be stored and maintained by a Receiving Party at a location and
 16 in a secure manner that ensures that access is limited to the persons authorized under this Order.

17 7.2 Disclosure of "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY"
 18 Information or Items. Unless otherwise ordered by the court or permitted in writing by the
 19 Designating Party, a Receiving Party may disclose any information or item designated "HIGHLY
 20 CONFIDENTIAL – ATTORNEYS' EYES ONLY" only to:

21 (a) the Receiving Party's Outside Counsel of Record in this action, as well as
 22 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the
 23 information for this litigation and who have signed the "Acknowledgment and Agreement to Be
 24 Bound" that is attached hereto as Exhibit A;

25 (b) House Counsel of a Receiving Party, as well as employees assisting said House
 26 Counsel, (1) who have no involvement in competitive decision-making involving any product or
 27 category of product at issue in this litigation, and (2) to whom disclosure is necessary for this
 28 litigation; **and who have signed the "Acknowledgement and Agreement to Be Bound" that is**
attached hereto as Exhibit A;

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(c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

(d) the Court and its personnel;

(e) court reporters, their staffs, and Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A); and

(f) the author of the document or the original source of the information.

7.3 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise ordered by the court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated “CONFIDENTIAL” only to:

(a) the Receiving Party’s Outside Counsel of Record in this action, as well as employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the information for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A;

(b) the officers, directors, and employees (including House Counsel) of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

(c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

(d) the court and its personnel;

(e) court reporters and their staff, professional jury or trial consultants, mock jurors, and Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

(f) during their depositions, witnesses in the action to whom disclosure is reasonably necessary and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A), unless otherwise agreed by the Designating Party or ordered by the court. Pages of

1 transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be
 2 separately bound by the court reporter and may not be disclosed to anyone except as permitted
 3 under this Stipulated Protective Order.

4 (g) the author or recipient of a document containing the information or a
 5 custodian or other person who otherwise possessed or knew the information.

6 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER
 7 LITIGATION

8 If a Party is served with a subpoena or a court order issued in other litigation that compels
 9 disclosure of any information or items designated in this action as “CONFIDENTIAL” or
 10 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” that Party must:

11 (a) promptly notify in writing the Designating Party. Such notification shall
 12 include a copy of the subpoena or court order;

13 (b) promptly notify in writing the party who caused the subpoena or order to
 14 issue in the other litigation that some or all of the material covered by the subpoena or order is
 15 subject to this Protective Order. Such notification shall include a copy of this Stipulated
 16 Protective Order; and

17 (c) cooperate with respect to all reasonable procedures sought to be pursued by
 18 the Designating Party whose Protected Material may be affected.

19 If the Designating Party timely seeks a protective order, the Party served with the
 20 subpoena or court order shall not produce any information designated in this action as
 21 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” before a
 22 determination by the court from which the subpoena or order issued, unless the Party has obtained
 23 the Designating Party’s permission. The Designating Party shall bear the burden and expense of
 24 seeking protection in that court of its confidential material – and nothing in these provisions
 25 should be construed as authorizing or encouraging a Receiving Party in this action to disobey a
 26 lawful directive from another court.

9. A NON-PARTY'S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN THIS LITIGATION

(a) The terms of this Order are applicable to information produced by a Non-Party in this action and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY." Such information produced by Non-Parties in connection with this litigation is protected by the remedies and relief provided by this Order. Nothing in these provisions should be construed as prohibiting a Non-Party from seeking additional protections.

(b) In the event that a Party is required, by a valid discovery request, to produce a Non-Party's confidential information in its possession, and the Party is subject to an agreement with the Non-Party not to produce the Non-Party's confidential information, then the Party shall:

(1) promptly notify in writing the Requesting Party and the Non-Party that some or all of the information requested is subject to a confidentiality agreement with a Non-Party;

(2) promptly provide the Non-Party with a copy of the Stipulated Protective Order in this litigation, the relevant discovery request(s), and a reasonably specific description of the information requested; and

(3) make the information requested available for inspection by the Non-Party.

(c) If the Non-Party fails to object or seek a protective order from this court within 14 days of receiving the notice and accompanying information, the Receiving Party may produce the Non-Party's confidential information responsive to the discovery request. If the Non-Party timely seeks a protective order, the Receiving Party shall not produce any information in its possession or control that is subject to the confidentiality agreement with the Non-Party before a determination by the court. Absent a court order to the contrary, the Non-Party shall bear the burden and expense of seeking protection in this court of its Protected Material.

10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected

Material to any person or in any circumstance not authorized under this Stipulated Protective Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order, and (d) request such person or persons to execute the “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A.

11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED MATERIAL

When a Producing Party gives notice to Receiving Parties that certain inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This provision is not intended to modify whatever procedure may be established in an e-discovery order that provides for production without prior privilege review. Pursuant to Federal Rule of Evidence 502(d) and (e), insofar as the parties reach an agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection, the parties may incorporate their agreement in the stipulated protective order submitted to the court.

12. MISCELLANEOUS

12.1 Right to Further Relief. Nothing in this Order abridges the right of any person to seek its modification by the court in the future.

12.2 Right to Assert Other Objections. By stipulating to the entry of this Protective Order no Party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Protective Order.

12.3 Filing Protected Material. Without written permission from the Designating Party or a court order secured after appropriate notice to all interested persons, a Party may not file in the public record in this action any Protected Material. A Party that seeks to file under seal any

Protected Material must comply with Civil Local Rule 79-5 ~~and General Order 62~~. Protected Material may only be filed under seal pursuant to a court order authorizing the sealing of the specific Protected Material at issue. Pursuant to Civil Local Rule 79-5 ~~and General Order 62~~, a sealing order will issue only upon a request establishing that the Protected Material at issue is privileged, protectable as a trade secret, or otherwise entitled to protection under the law. If a Receiving Party's request to file Protected Material under seal pursuant to Civil Local Rule 79-5(d) ~~and General Order 62~~ is denied by the court, then the Receiving Party may file the information in the public record pursuant to Civil Local Rule 79-5(e) unless otherwise instructed by the court.

13. FINAL DISPOSITION

Within 60 days after the final disposition of this action, as defined in paragraph 4, each Receiving Party must return all Protected Material to the Producing Party or destroy such material. As used in this subdivision, "all Protected Material" includes all copies, abstracts, compilations, summaries, and any other format reproducing or capturing any of the Protected Material. Whether the Protected Material is returned or destroyed, the Receiving Party must submit a written certification to the Producing Party (and, if not the same person or entity, to the Designating Party) by the 60 day deadline that (1) identifies (by category, where appropriate) all the Protected Material that was returned or destroyed and (2) affirms that the Receiving Party has not retained any copies, abstracts, compilations, summaries or any other format reproducing or capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts, legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work product, and consultant and expert work product, even if such materials contain Protected Material. Any such archival copies that contain or constitute Protected Material remain subject to this Protective Order as set forth in Section 4 (DURATION).

14. All disclosure and discovery disputes are subject to the undersigned's Standing Order re: Civil Discovery Disputes.

1 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

2
3 Dated: December 4, 2013

DRINKER BIDDLE & REATH LLP

4
5 By: /s/ Amy P. Frenzen
Amy P. Frenzen

6 Attorneys for Defendant
7 HEWLETT-PACKARD COMPANY

8
9 Dated: December 4, 2013

SOLOMON E. ANTAR, PC

10
11 By: /s/ Solomon E. Antar
Solomon E. Antar

12 Attorneys for Plaintiff
13 DISCOVER GROUP, INC.

14
15 **Attestation Pursuant to Local Rule 5.1(i)(3)**

16 Pursuant to Local Rule 5.1(i)(3), I, Amy P. Frenzen, hereby attest that I am the ECF user
17 whose ID and password are being used to file this Stipulated Protective Order and I have
18 obtained concurrence from Solomon Antar, counsel for Plaintiff, in the filing of this document. I
19 declare under penalty of perjury under the law of the United States of America that the foregoing
20 is true and correct.

21 Dated: December 4, 2013

/s/ Amy P. Frenzen
Amy P. Frenzen

22
23 **AS MODIFIED BY THE COURT**
24 PURSUANT TO STIPULATION, IT IS SO ORDERED.

25 DATED: 1/28/14

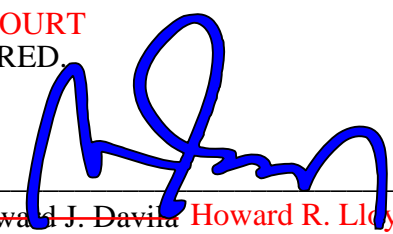
26 
27 ~~Edward J. Davila~~ **Howard R. Lloyd**
United States District Judge **Magistrate Judge**

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of _____ [print or type full address], declare under penalty of perjury that I have read in its entirety and understand the Stipulated Protective Order that was issued by the United States District Court for the Northern District of California on _____ [date] in the case of DISCOVER GROUP, INC. v. HEWLETT-PACKARD COMPANY, CASE NO. 12-CV-4077 (EJD), I agree to comply with and to be bound by all the terms of this Stipulated Protective Order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Stipulated Protective Order to any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the Northern District of California for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ [print or type full name] of _____ [print or type full address and telephone number] as my California agent for service of process in connection with this action or any proceedings related to enforcement of this Stipulated Protective Order.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____